LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
APR 15 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 108

SEARS, ROEBUCK AND CO.,

Petitioner,

vs.

THE STIFFEL COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

WILL FREEMAN,
135 South La Salle Street,
Chicago 3, Illinois,
Attorney for Petitioner.

Of Counsel:
FRANK H. MARKS,
D. D. ALLEGRETTI,
GEORGE B. NEWITT.

THE BLAKELY-HARREN PRINTING COMPANY, CHICAGO

INDEX.

	PAGE
Citations to Opinions Below	1
Jurisdiction	2
Constitutional Provision and Statutes Involved	2
Question Presented	3
Statement	3
Reasons for Granting the Writ	4
Conclusion	11
Appendix	13

TABLE OF CASES.

Day-Brite Lighting, Inc. v. Compco Corporation, 311 F. 2d 26, 30 (C. A. 7, 1962)	4
G. Ricordi & Co. v. Haendler, 194 F. 2d 914 (C. A. 2, 1952)	9
Hygienic Specialties Co. v. H. G. Salzman, Inc., 302 F. 2d 614, 619 (C. A. 2, 1962)	6, 7, 8, 10
Korzybski v. Underwood & Underwood, 36 F. 2d 727, 729 (2nd Cir., 1929)	6
Northern Pacific Ry. v. U. S., 356 U. S. 1, 4 (1958)	6
Scott Paper Co. v. Marcalus, 326 U. S. 249, 255 (1945)	5
Shredded Wheat Co. v. Humphrey Cornell Co., 250 F. 960, 964 (C. A. 2, 1918)	8
United States v. Loew's, Inc., 83 S. Ct. 97, 102, ... U. S. ..... (1962)	9
Wheaton et al. v. Peters et al., 8 Peters 591, 661 (1834)	5
Zangerle & Peterson Co. v. Venice Furniture Novelty Mfg. Co., 133 F. 2d 266, 269	8

STATUTES.

Article I, § 8, Clause 8, United States Constitution . . 2, 5, 7
17 U. S. C. § 24 7
28 U. S. C. § 1254 (1) 2
28 U. S. C. 1338 (a) and (b) 2
35 U. S. C. § 154 7
35 U. S. C. § 171 2
35 U. S. C. § 173 . . . . . 2, 7
35 U. S. C. § 281 2

PUBLICATIONS.

University of Pennsylvania Law Review, Vol. 110, No. 7 (May 1962) 10
Ohio State Law Journal, Vol. 23, No. 1 (1962) 10
1 Walker on Patents, Deller's Edition 28 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. _____

SEARS, ROEBUCK AND CO.,

Petitioner,

vs.

THE STIFFEL COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on January 23, 1963.

CITATIONS TO OPINIONS BELOW.

The District Court did not write an opinion but a copy of the Court's Judgment and Findings relating to unfair competition are printed as part of the Appendix to this petition, as well as in the record before the Court of Appeals. The opinion of the Court of Appeals is also printed in the Appendix and is reported in 313 F. 2d 115. Petitioner's petition for a rehearing was denied on March 4, 1963.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED.

Article I, § 8, Clause 8 of the Constitution of the United States:

> "The Congress shall have power . . . To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

35 U. S. C. § 171:

> "Whoever invents any new, original and ornamental design for an article of manufacture may obtain a patent therefor, . . ."

35 U. S. C. § 173:

> "Patents for designs may be granted for the term of three years and six months, or for seven years, or for fourteen years, as the applicant, in his application, elects."

35 U. S. C. § 281:

> "A patentee shall have remedy by civil action for infringement of his patent."

28 U. S. C. § 1338:

> "(a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, copyrights and trademarks. Such jurisdiction shall be exclusive of the courts of the states in patent and copyright cases.
>
> "(b) The district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent or trade-mark laws."

QUESTION PRESENTED.

Where the Constitution grants to Congress "the power to promote the progress of science and useful arts, by securing for *limited* times to authors and inventors the exclusive right to their respective writings and discoveries," can a Federal court, applying what it believes to be the State law of unfair competition, *perpetually* enjoin the sale of copies of a patented device after the patent covering the device has been judicially terminated?

STATEMENT.

Respondent, the Plaintiff in the Trial Court, sued Petitioner, Sears, Roebuck and Co., for infringement of a design patent covering a pole lamp. Respondent also included in its Complaint a count for unfair competition on the ground that Petitioner's copy of the physical embodiment of the lamp shown in the design patent resulted in confusion of purchasers. The patented lamp was being made and sold by Respondent when the Petitioner entered the field. Petitioner's lamp sold for a lower price than that of Respondent.

The District Court held the design patent invalid because it lacked invention over prior designs in the public domain. But the Court found Petitioner guilty of unfair competition, pointing out that the similarity between the lamps of Petitioner and Respondent was "so close that confusion between them is likely and some confusion has already occurred." (Trial Court Finding No. 42 in attached Appendix.) The judgment of the Court enjoined future sale of lamps identical to those covered by the design patent it held invalid. (¶ 3 of Judgment in attached Appendix.)

The Court of Appeals affirmed the judgment of the District Court in all respects, including the Trial Court's find-

ing of likelihood of confusion, and concluded that such a finding is sufficient to make out a case of unfair competition (footnote 7 of Court's decision). For authority, the Court of Appeals relied upon its opinion in *Day-Brite Lighting, Inc.* v. *Compco Corporation*, 311 F. 2d 26 (C. A. 7, 1962), decided just about one month before the present case. There the Court stated that the law of Illinois is *no longer* to the effect that "mere copying of the teaching of an invalid patent does not constitute unfair competition" (311 F. 2d 26, 30). The Court concluded:

> "The essence of 'unfair competition' is that it be unfair, that 'in all cases of unfair competition, it is principles of old-fashioned honesty which are controlling.'"

The petitioner then petitioned the Court of Appeals for a rehearing on its decision with respect to the question of unfair competition. The petition was denied on March 4, 1963.

Thus, the effect of the Court of Appeals decisions in this case and in the *Day-Brite* case is to preclude copying the subject matter of an invalid patent, subject matter which is in the public domain. A petition for writ of certiorari has been filed recently in the *Day-Brite* case by Compco Corporation, presenting substantially the same question posed in this petition.

REASONS FOR GRANTING THE WRIT.

1. Should the law of the Seventh Circuit prevail, what the Constitution, the Congress and this Court prescribe as exclusively a Federal matter—the legal consequences of the expiration of a patent—could be affected by the laws of unfair competition in 50 states.

Prior to the ratification of the Constitution, many of the states had enacted their own copyright and patent laws.

As early as 1641 Massachusetts granted a patent to Samuel Winslow for a method of making salt. In the Patent Statute passed by Congress in 1793, § 7 recognized patents granted by the states *prior* to "its adoption of the present form of government," but expressly provided that the State rights and Federal rights were mutually exclusive.[1]

In the 43rd number of the *Federalist*, Madison made this short comment on the Constitutional Clause:

> "The States cannot separately make effectual provision for either of these cases" (patents or copyrights), "and most of them have anticipated the decision of this point, by laws passed at the instance of Congress."

It was apparent from the beginning that the states could not effectively provide for the rights of inventors and authors and that this had to be a Federal matter. To promote uniformity in the law with respect to copyrights and patents, Article I, § 8, Clause 8, was provided in the Constitution. Congress enacted laws pursuant to this authority, thus *creating* limited rights of inventors and authors to their published works.

The common law recognized no exclusive right in authors or inventors to the fruits of their labors. The word "secure" in the constitutional provision does not indicate the protection of a right already in existence.

> "Congress, then, by this act [Copyright Act of 1790] instead of sanctioning an existing right, as contended for, created it." *Wheaton et al.* v. *Peters et al.*, 8 Peters 591, 661 (1834).

This Court has more recently indicated that "The nature and extent of the legal consequences of the expiration of a patent are federal questions . . ."[2]

To permit each state to impose its own peculiar restric-

1. 1 Walker on Patents, Deller's Edition 28.
2. *Scott Paper Co.* v. *Marcalus*, 326 U. S. 249, 255 (1945).

tions upon use of property which has been dedicated to the public by patenting under Federal statute (save the exclusive right to make, use and sell for a limited term)[3] results in a legal hodgepodge. The business community must know what rules govern the game. Only this Court can clarify those rules so that business can progress with a reasonable degree of certainty with respect to its right to imitate.

2. The law of the Seventh Circuit, enunciated in *Day-Brite* and reiterated in the present case, has the effect of stifling competition and burdening commerce. The primary goal of our economic system is the promotion of the wide availability of useful goods at a reasonable cost. Whenever copying is prohibited, the scope of competition in the production and marketing of the copied product is likewise reduced, thereby compromising to some degree the basic free enterprise premise "that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress."[4] Indeed, "imitation is the life blood of competition."[5] The complex antitrust laws and the tremendous effort expended in their vigorous enforcement are necessary only because free competition is a matter of great public importance.

Thus the Court of Appeals decision is not one affecting only the litigants, but reaches to every member of the purchasing public who is interested in obtaining quality merchandise at low cost. The mischief that will result if this decision is permitted to stand is intensified when one considers the high degree of industrialization in the geo-

3. *Korzybski* v. *Underwood & Underwood*, 36 F. 2d 727, 729 (2nd Cir. 1929).

4. *Northern Pacific Ry.* v. *U. S.*, 356 U. S. 1, 4 (1958).

5. *Hygienic Specialties Co.* v. *H. G. Salzman Inc.*, 302 F. 2d 614, 619 (C. A. 2, 1962).

graphical area comprising the Seventh Circuit. Only this Court can rectify the law to insure the continuation of free competition in products released from the restraints of statutory monopoly.

3. The decision of the Court of Appeals frustrates the purpose of the patent system: to promote the progress of science and useful arts.[6] Unless the public is free to utilize the knowledge disclosed in a patent upon termination of the grant (either by expiration, or by judicial determination) the patent grant becomes a useless thing,—indeed, a very harmful thing. The copyright and patent statutes enacted pursuant to the Constitution secure to authors and inventors exclusive rights "for *limited* times." The statutes specify these times in years.[7]

The injunction granted by the District Court and affirmed by the Court of Appeals enjoins Petitioner perpetually from "selling or attempting to sell pole lamps identical to or confusingly similar to plaintiff's exhibits 3 and 10." Plaintiff's Exhibits 3 and 10 are the very lamps (Stiffel and Sears, respectively) held by the District Court, and affirmed by the Court of Appeals, to infringe the claims of the design patent in suit, if valid (Conclusion of Law 4, R. 350). But the claims were held invalid (Conclusions 2 and 3; R. 349-350). If, in fact, there has been a violation of the Illinois law of unfair competition, the Federal Court should designate an appropriate remedy for that tort. *But it may not frustrate the Federal patent law by enjoining the copying of the identical design of the invalid patent.*[8] Judge Learned Hand well appreciated this problem: "Un-

6. Article I, § 8 of the United States Constitution.

7. Seventeen years for a mechanical patent (35 U. S. C. 154); 3½, 7 or 14 years for a design patent (35 U. S. C. 173); and 28 years for a copyright (17 U. S. C. 24).

8. *Hygienic Specialties* v. *H. G. Salzman*, 302 F. 2d 614 (C. A. 2, 1962).

der the guise of protecting against unfair competition, we must be jealous not to create perpetual monopolies.'"[9]

Unless this Court intervenes to restore the law to its proper posture, it can remain in its present state indefinitely. The Court of Appeals refused to review the question and denied rehearings in both the *Day-Brite* case and the present case.

4. The Seventh Circuit Court of Appeals in its decision has established a rule which is directly contrary to that of other Circuits,[10] particularly the Second Circuit where so many of the copyright and patent cases arise. In the recent case of *Hygienic Specialties Co.* v. *H. G. Saleman, Inc.*, 302 F. 2d 614 (C. A. 2, 1962), the plaintiff's design patent was held invalid. The Complaint included a count for unfair competition. In upholding the defendant's right to copy what was shown in the invalid design patent, the Court stated (p. 619):

> "Since Hygienic's soap dish was not protected by a valid design patent, there was little to prevent others from producing similar articles. The District Court

---

9. *Shredded Wheat Co.* v. *Humphrey Cornell Co.*, 250 F. 960, 964 (C. A. 2, 1918).

10. This was not always the law in the Seventh Circuit. As recently as 1943 this Court of Appeals upheld defendant's right to copy an invalid design patent:

> "This brings us to a consideration of the second phase of the case: Was there unfair competition? The defendant frankly admits it copied the plaintiff's table. If the plaintiff never had a patent, then the mere act of copying did not amount to unfair competition. After a patent expires, one may copy it. It then belongs to the public. The patentee's monopoly is gone."
>
> *Zangerle & Peterson Co.* v. *Venice Furniture Novelty Mfg. Co.*, 133 F. 2d 266, 269.

But in the *Day-Brite* case, and in the present case, the Court refused to follow that decision on the ground that the "rule argued for here is 'no longer the law of Illinois'" (*Stiffel* v. *Sears*, 313 F. 2d 115, 118).

was greatly disturbed by Hutzler's 'slavish imitation' of Hygienic's 'successful product.'"

* * * * * *

"But, as Judge Medina points out in the quoted opinion, 'this initial response to the problem has been curbed in deference to the greater public good,' apparently on the principle that 'imitation is the life blood of competition.' Id. at p. 272. Therefore, the courts have repeatedly held that the copying of an unpatented design does not in itself constitute unfair competition. *Algren Watch Findings Co., Inc.* v. *Kalinsky*, 197 F. 2d 69, 70 (2nd Cir. 1952); *General Time Instruments Corp.* v. *U. S. Time Corp., supra*, 165 F. 2d at p. 854."

Judge Learned Hand went into the question more particularly with respect to conflicting State law of unfair competition in the copyright case of *G. Ricordi & Co.* v. *Haendler*, 194 F. 2d 914 (C. A. 2, 1952).[11] In that case the copyright on plaintiff's book containing the libretto and score of Verdi's opera "Falstaff" had expired. The plaintiff sued one who had copied the book by photographing its pages, alleging that by copying the typography, in addition to the words and the notes, the defendant was guilty of unfair competition under New York law. Judge Hand discussed the New York cases and then said (p. 915):

"None of the decisions on which the plaintiff relies held that after copyright had expired the 'author' may prevent others from copying.

"However, *even if the law of New York were to that effect, we should feel obliged to disregard it, because the question before us is one of federal law:* i. e. Did the plaintiff preserve any rights after pub-

11. We have already pointed out that copyrights and patents are twin rights, stemming from the same provision in the Constitution. The principles of patent cases are frequently applied to copyright cases and vice versa. (See Justice Goldberg's parallel treatment in *United States* v. *Loew's, Inc.*, ... U. S. .... 83 S. Ct. 97, 102 (1962).)

lication in the book except those granted by the Copyright Act?"

* * * * *

"We do not mean that the defendant could under no circumstances be guilty of 'unfair competition' in his use of the 'work'; *but it would have to be by some conduct other than copying it.*" (p. 916.) (Emphasis supplied.)

The Court of Appeals in the present case has held that Petitioner must be perpetually enjoined from selling "pole lamps identical to or confusingly similar to Plaintiff's Exhibits 3 and 10 (the lamp covered by the invalid design patent)." It justifies this injunction on the ground that confusion has resulted because the Petitioner has copied Respondent's lamp.[12] Thus, we see that this decision is in head-on conflict with Judge Hand's decision in *Ricordi*, and the more recent Second Circuit case of *Hygienic Specialties* v. *Salzman*.

The question presented here is of great public importance.[13] The conflict and uncertainty which exists today in the Federal courts, exemplified by the cited decisions of the Seventh and the Second Circuits, can be reconciled only by this Court.

---

12. As precedents, the Court relied upon Illinois decisions in trademark cases to the effect that likelihood of confusion of goods is sufficient by itself to establish a case of unfair competition. But the inapplicability of trademark decisions to patent cases is at once apparent when the historical origin of these rights is considered. Trademark rights are based upon the common law, clearly within the scope of State powers. In distinction, rights in patents and copyrights stem from the United States Constitution and are purely Federal.

13. Legal scholars recently have been concerned with the doubts of the courts in trade regulation law including the question posed here. See Stern & Hoffman, "Public Injury and the Public Interest: Secondary Meaning in the Law of Unfair Competition", University of Pennsylvania L. R., Vol. 110, No. 7, May 1962; Pollack, "Unfair Trading by Product Simulation; Rule or Rankle?", Ohio State L. J., Vol. 23, No. 1, 1962.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

WILL FREEMAN,
135 South La Salle Street,
Chicago 3, Illinois,
Attorney for Petitioner.

Of Counsel:
FRANK H. MARKS,
D. D. ALLEGRETTI,
GEORGE B. NEWITT.

APPENDIX.

313 F. 2d 115. Rehearing Denied Nov. 4, 1962.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

Nos. 13724-5 September Term, 1962 January Session, 1963.

THE STIFFEL COMPANY, *Plaintiff-Appellant and Cross-Appellee,* *vs.* SEARS, ROEBUCK AND CO., *Defendant-Appellee and Cross-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

January 23, 1963

Before HASTINGS, *Chief Judge,* KNOCH and KILEY, *Circuit Judges.*

KILEY, *Circuit Judge.* This is a patent infringement and unfair competition suit. Defendant answered that the patents in suit were invalid and that defendant was not guilty of unfair competition; and its counterclaim sought declaratory judgment accordingly. The District Court found the patents invalid, but found defendant guilty of unfair competition. From the judgment on these findings, each party has appealed.

The patents in suit are Stiffel Patent No. 2,793,286 and Stiffel Design Patent No. 180,251, both relating to floor to ceiling "pole lamps." The patents were issued to

Theophile Stiffel in May, 1957, and subsequently were assigned to plaintiff. The lamp was first shown the public in 1956. Plaintiff learned from a Sears, Roebuck & Co.[1] catalogue in 1957 that pole lamps were being sold by Sears. It purchased a Sears lamp in Greensboro, North Carolina, and this suit followed.[2]

The vital questions are upon the findings and conclusions with respect to patent invalidity and unfair competition. There is, however, a preliminary procedural question.

As part of the Sears proof, the court admitted in evidence Exhibit No. 55, a Deca pole lamp. Plaintiff contends the ruling was erroneous because Sears failed to give notice of the exhibit under 35 U. S. C. § 282. That section requires at least thirty days notice of patents and publications relied on as anticipating the patents in suit. However, the trial court may admit the proof, in the absence of notice, "on such terms as the court requires." The ruling on Exhibit No. 55 was within the court's discretion. *C. S. Johnson Co.* v. *Stromberg*, 242 F. 2d 793, 797 (9th Cir. 1957), *Thermo King Corp.* v. *White's Trucking Service, Inc.*, 292 F. 2d 668 (5th Cir. 1961). We are not convinced, on the facts before the District Court, that plaintiff had no opportunity, because of the ruling, to present his case, as the Court of Appeals was convinced in *Thermo King*. We find no abuse of discretion and no error in the ruling.

The Stiffel pole lamp consists of a plurality of detachable tubular members, of small diameter, joined together to form a single pole longer than the distance between floor and ceiling of a room. It carries three lamps,[3] with swivel

1. Hereinafter referred to as Sears.

2. Originally filed in North Carolina and later removed to the Northern District of Illinois, Eastern Division, for trial.

3. The patent application illustration shows three lamps but "• • • while three are shown any number of lighting fixtures may be suitably arranged on said section at different desired elevations • • •"

brackets, on the exterior of one of the sections. The lamps are served by wires "extending interiorly"[4] down through and out the lower section of the pole. In use it is supported between floor and ceiling under compression of a spring contained in the uppermost section. The upper and lower ends are small round felt or rubber covered discs to protect ceiling and floor. The lower disc is at the end of an adjustable leg for making fine adjustments to the length of the pole.

The District Court found that the Stiffel pole lamp was anticipated in the prior art more than one year prior to the Stiffel patent application in January, 1956, by Sears' public use and sale of the Deca pole lamp; and in printed publications. The question is whether the court erred in concluding, on these findings, that Stiffel Patent No. 2,793,286 is invalid.[5]

The findings underlying the conclusion have substantial basis in the admitted use of the Deca poles by Sears in 1953 and 1954, and the evidence of their published illustrations, sketches and descriptions more than one year prior to the Stiffel patent application, *H. W. Gossard Co.* v. *J. C. Penney Company*, 304 F. 2d 515, 518 (7th Cir. 1962), and were sufficient to overcome the presumption of validity of the patent. We hold the conclusion of invalidity of Patent No. 2,793,286 is not clearly erroneous.

The Deca pole included all the essential elements of the Stiffel pole except the adjustable leg. Instead of the

4. Term used in Stiffel patent application claims.

5. 35 U. S. C. § 102 provides, in part, as follows:

"A person shall be entitled to a patent unless—a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for patent, or b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States . . ."

adjustable leg, the Deca pole employed an equivalent, *i.e.*, sections of various lengths for adjusting height. The court was not required to find on the evidence that the adjustable leg was novel or was functionally different than the various sized sections of Deca pole which have the same purpose. This is true also of the Stiffel spring unit and the Deca pole sliding section and spring which have the same effect. And there is substantial evidence that Deca pole had the wire run "extending interiorly" within the pole.

The District Court's conclusion of invalidity of Design Patent No. 180,251 rests on findings that the Deca pole Exhibit No. 55 does not differ in ornamental design aspects from the Stiffel patented design, and that the Miller "Lamp Tree" was disclosed in several magazines in 1950 and 1954. Plaintiff challenges this conclusion.

The Design Patent claims only "the ornamental design for a lighting fixture, as shown." The finding with respect to the Miller "Lamp Tree" anticipating the Stiffel design has sufficient support in the evidence of the disclosure of the Lamp Tree in printed publications. The finding is not clearly erroneous, and we need not therefore discuss the finding as to Exhibit No. 55. We hold the conclusion of the invalidity of Design Patent No. 180,251 is not erroneous.

Because the District Court's conclusions with respect to the patents are not erroneous, it follows that the court did not err in its conclusion of non-infringement.

There is substantial basis in the evidence to support the findings underlying the conclusion that Sears was guilty of unfair competition. The evidence is: The lamp had a decided impact on the market in 1956 as something revolutionary in lighting fixtures. In four years (1956-1960) Stiffel shipped about $3,250,000 in pole lamps. They were widely advertised in national magazines. Sears "moved in" when they saw the Stiffel pole lamp was moving toward a mass market. Sears lamps are not labelled, and the Sears lamp retails at the wholesale price of the Stiffel lamp.

The Stiffel pole lamps and that of Sears made from a copy of a picture of the Stiffel lamp are before us as exhibits. A comparison of the two gives substantial support for the finding that the lamps have a remarkable sameness of appearance. And there is testimony of buyers for Marshall Field and Company and John M. Smyth Company of customer confusion. The finding that there is a likelihood of confusion[6] and some actual confusion, as to the source of the lamps, is not clearly erroneous. The conclusion of unfair competition, based on the finding,[7] is not erroneous.

Sears argues that plaintiff's proof failed to show "palming off" or "secondary meaning" under the law of Illinois as expressed by this court in *Zangerle & Peterson Co.* v. *Venice Furniture Novelty Mfg. Co.*, 133 F. 2d 266, 269 (7th Cir. 1939) and *Day-Brite Lighting, Inc.* v. *Sandee Mfg. Co.*, 286 F. 2d 596, 600 (7th Cir. 1961). In *Independent Nail & Packing Co. Inc.* v. *Stronghold Screw Products, Inc.*, 205 F. 2d 921, 925 (7th Cir. 1953), Judge Duffy said that the rule argued for here is "no longer the law of Illinois," citing *Investors Syndicate of America, Inc.* v. *Edward J. Hughes, Secretary of State*, 378 Ill. 413, 422, 38 N. E. 2d 754, 759 (1942), and *Lady Esther, Ltd.* v. *Lady Esther Corset Shoppe*, 317 Ill. App. 451, 46 N. E. 2d 165 (1943). Judge Knoch repeated Judge Duffy's statement recently in *Day-Brite Lighting, Inc.* v. *Compco Corp.*, ... F. 2d ..... (7th Cir. Dec. 14, 1962).

For the reasons given the judgment is AFFIRMED.

---

6. The finding of customer confusion does not say "as to the source of the lamps." Clearly, however, that was intended on this record in view of the testimony of the buyers.

7. Under Illinois law, which governs here, it was unnecessary to prove more than the likelihood of confusion as to the source of the products in order to make out a case of unfair competition. *Independent Nail & Packing Co. Inc.* v. *Stronghold Screw Products, Inc.*, 205 F. 2d 921, 926 (7th Cir. 1953), *National Van Lines* v. *Dean*, 288 F. 2d 5, 9 (7th Cir. 1961). Those were trademark cases, but the rule is also applied in design patent unfair competition cases. *Day-Brite Lighting, Inc.* v. *Compco Corp.*, ... F. 2d .... (7th Cir., Dec. 14, 1962).

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois,
Eastern Division.

THE STIFFEL COMPANY,
Plaintiff,
vs.
SEARS, ROEBUCK AND CO.,
Defendant.

Civil Action
No. 58 C 1067.

JUDGMENT (R. 352).

This matter coming on for entry of final judgment on the issues of patent infringement and unfair competition, and the Court having entered its Findings of Fact and Conclusions of Law, and the Court being fully advised,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, as follows:

1. The claims of U. S. Patent No. 2,793,286 are hereby declared to be invalid.

2. The claim of U. S. Patent No. 180,251 is hereby declared to be invalid.

3. Defendant and its agents, representatives and employes, are hereby enjoined from unfairly competing with plaintiff by selling or attempting to sell pole lamps identical to or confusingly similar to plaintiff's exhibits 3 and 10.

4. The plaintiff's complaint, insofar as it charges patent infringement, is dismissed on its merits.

5. The defendant's counterclaim, insofar as it seeks

a declaratory judgment of invalidity of Patent No. 2,793,286 and Design Patent No. 180,251, is granted.

6. An accounting shall be taken concerning the amount and extent of defendant's unfair competition, and the profits and damages resulting therefrom.

7. Proceedings to take the accounting decreed in paragraph 6 of this Judgment shall be continued generally pending disposition of such other matters and proceedings as the parties may present or institute concerning the provisions of this Judgment.

Enter:

JULIUS H. MINER,
Judge.

Dated: Jan. 22, 1962.

TRIAL COURT'S FINDINGS OF FACT ON UNFAIR COMPETITION COUNT (R. 348).

III. Unfair Competition Issues.

39. Defendant has had actual knowledge of plaintiff's lamp products since early in 1956 before it sold any pole lamps.

40. When the defendant decided to sell pole lamps in 1956, it made a substantially exact copy of the Stiffel product, Plaintiff's Exhibit 3. Defendant did not copy any of the prior art structures which were offered in evidence.

41. Defendant induced Randolph Metal Works, Inc. to make the pole lamps charged to infringe and sought it out for that purpose. The Randolph company had not theretofore made pole lamps.

42. The pole lamp of defendant, Plaintiff's Exhibit 10, is so closely similar to Plaintiff's Exhibit 3, plaintiff's

product, as to be scarcely indistinguishable therefrom both in appearance and in functional details. The similarity is so close that confusion between them is likely, and some confusion has already occurred.

43. Defendant knowingly copied plaintiff's products when it had made for it and sold the pole lamps exemplified by Plaintiff's Exhibit 10.

44. Defendant continued to have made for it and to sell pole lamps as exemplified in Plaintiff's Exhibit 10, copying in detail plaintiff's pole lamp, Plaintiff's Exhibit 3, even after this action was filed.

PORTION OF TRIAL COURT'S CONCLUSIONS OF LAW INCLUDING THOSE ON UNFAIR COMPETITION COUNT (R. 350, 351).

5. Defendant's sale of pole lamps like Plaintiff's Exhibit 10 has amounted to unfair competition with plaintiff.

6. Plaintiff is entitled to an injunction to restrain further unfair competition by defendant with respect to pole lamps identical to or confusingly similar to plaintiff's Exhibits 3 and 10.

7. Plaintiff is entitled to an accounting to determine the amount and extent of defendant's unfair competition, and the profits and damages resulting therefrom.

8. Defendant is entitled to a judgment dismissing the charge of patent infringement on its merits.

9. Defendant is entitled to a declaratory judgment on its counterclaim that patents number 2,793,286 and Design 180,251 are invalid.

JULIUS H. MINER,
Judge.

Dated: Jan. 22, 1962.